

DIVISION II

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION

ROBERT J. GLADWIN, Judge

CACR05-1087

JUNE 28, 2006

TIM CARTER, III

APPELLANT

APPEAL FROM THE CHICOT COUNTY  
CIRCUIT COURT  
[NO. CR2003-117-4]

V.

HON. DON E. GLOVER,  
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED;  
MOTION GRANTED

Appellant Tim Carter, III, entered a guilty plea to a charge of delivery of cocaine. The sentencing phase of the case was tried before a Chicot County jury, and appellant was sentenced to a term of five years and one day in the Arkansas Department of Correction with an additional suspended sentence of five years. After performing the review required of us in no-merit cases, we affirm appellant's sentence, and we grant counsel's motion to be relieved.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j), appellant's counsel has filed a motion to withdraw on the ground that this appeal is wholly without merit. This motion was accompanied by a brief discussing all matters in the record that might arguably support an appeal, including all adverse rulings and a statement as to why counsel considers each point raised as being incapable of supporting a meritorious appeal.

Appellant was provided a copy of his counsel's brief and was notified of his right to file a list of points on appeal within thirty days. Appellant elected not to file any points.

There were two adverse rulings that were entered against appellant during the sentencing phase of his trial. The first consisted of the trial court overruling appellant's objection to the introduction of a video tape that showed a drug transaction between appellant and a confidential informant. The transaction was the basis for appellant's guilty plea to the charge of delivery of cocaine, and he argued that, because he had already entered a guilty plea, the evidence on the video tape was not relevant for sentencing purposes.

Since 1993, Arkansas law has provided for a bifurcated-sentencing procedure, with guilt and sentence being determined by a jury at separate phases. Arkansas Code Annotated section 16-97-101 governs this procedure, and the statute provides, in relevant part, as follows:

- The following procedure shall govern jury trials which include any felony charges:
- (1) The jury shall first hear all evidence relevant to every charge on which a defendant is being tried and shall retire to reach a verdict on each charge.
  - (2) If the defendant is found guilty of one (1) or more charges, the jury shall then hear additional evidence relevant to sentencing on those charges. Evidence introduced in the guilt phase may be considered, but need not be reintroduced at the sentencing phase.
  - (3) Following the introduction of additional evidence relevant to sentencing, if any, instruction on the law, and argument, the jury shall again retire and determine a sentence within the statutory range. . . .

*See also Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Our supreme court has stated that the legislature has provided for separate and distinct procedures governing jury trials and sentencing by jury and that "*sentencing is now, in essence, a trial in and of itself, in which*

*new evidence may be submitted.” Id. at 62, 76 S.W.3d at 830 (citing Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994)). (Emphasis added.)*

During sentencing, the jury is allowed to consider evidence that would have been submitted during the guilt phase of the trial, but it may consider other evidence as well. Evidence that is relevant to sentencing may include, but is not limited to, prior convictions of the defendant, victim-impact evidence or statements, relevant character evidence, and evidence of aggravating and mitigating circumstances. *Marshall v. State*, 342 Ark. 172, 27 S.W.3d 392 (2000). Arkansas Code Annotated section 16-97-103(7) specifically lists evidence relevant to guilt presented in the first stage as evidence that is relevant to sentencing by either the court or a jury. The video tape in question would have been relevant to the guilt stage of the trial, had evidence been presented. Accordingly, the jury was entitled to consider it in the sentencing phase of the trial.

The second adverse ruling consisted of the trial court overruling appellant’s objection to the admission of any reference relating to the proximity of the drug transaction to a day-care center, a church, and other businesses in the community. Appellant argued that he had not been charged with selling cocaine within a specified prohibited distance from such establishments; accordingly, the information was not relevant for sentencing purposes.

At trial, the State conceded that the evidence could not be presented for the purpose of sentence enhancement because appellant was not charged with that specific offense; however, the State argued that the evidence was relevant for sentencing in general because

the information supplied circumstances of the drug transaction as well as the proximity to other establishments in the community, such as the day-care center, post office, police department, and prosecuting attorney's office. The State maintained that by allowing them to specifically describe where the various locations were in relation to the drug transaction, the jury could fully understand the circumstances of the crime. The contention was that because it would have been relevant in the guilt phase, it is relevant for sentencing as well, pursuant to Ark. Code Ann. § 16-97-103. Specifically, the State asserted that, because of the probability that appellant's counsel was likely to ask for probation, the evidence was relevant to show that probation was not an appropriate option because of the proximity between the drug transaction and the various community locations. All the locations mentioned were places of business, and the drug transaction occurred in very close proximity to them, rather than in some hidden location. The State pointed out that appellant did not go out of his way to keep anyone from discovering his activities, instead throwing caution to the wind by engaging in these type activities in the middle of town and in broad daylight. Evidence that is relevant to sentencing may include, but is not limited to, evidence of aggravating and mitigating circumstances. *See Marshall v. State, supra*. Our supreme court has held that trial courts are afforded wide discretion in evidentiary rulings. *Davis v. State*, \_\_ Ark. \_\_, \_\_ S.W.3d \_\_ (Mar. 16, 2006). We will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion, and, likewise, we will not reverse absent a showing of prejudice. *Id.* Under these circumstances, we hold that the trial court did not abuse its

discretion in admitting information relating to the proximity of the drug transaction to various business and community-related locations.

From a review of the record and the brief presented to this court, we find compliance with Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, and pursuant to the requirements of *Anders*, we hold that there is no basis for reversal. Accordingly, appellant's judgment of conviction is affirmed, and counsel's motion to be relieved is granted.

Affirmed.

Motion to withdraw as counsel granted.

ROBBINS and BIRD, JJ., agree.